Office - Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

82-132

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,

CROSS PETITIONERS,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT O. WEFALD
Attorney General

OWEN L. ANDERSON
Special Assistant Attorney General

UND School of Law
Grand Forks, N.D. 58202
(701) 777-2961

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Whether a state may seek a declaration of navigability to establish its claim to sovereign public trust lands in a federal court and enjoin federal officials from interfering with the State's sovereignty over such lands. (5 U.S.C. 702; 28 U.S.C. 1331, 1361, 2201; 43 U.S.C. 1301, 1311).*

---

* CONDITION: The State of North Dakota respectfully requests that this cross-petition for a writ of certiorari be granted only if the federal defendants' petition for a writ of certiorari is granted (No. 81-2337).

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement	5
Reasons for Granting the Cross-Petition	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

American Federation of Government Employees, Local 1858 v. Callaway, 398 F. Supp. 176 (N.D. Ala. 1975)	20
Andros v. Rupp, 433 F.2d 70 (9th Cir. 1970)	19
Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978)	9
Armstrong v. Udall, 435 F.2d 38 (9th Cir. 1970)	19
Barney v. Keokuk, 94 U.S. 324 (1876)	10,17
State of California ex rel. State Lands Commission v. United States, 50 U.S.L.W. 4671 (U.S. June 18, 1982) (No. 89, Original)	11
California v. United States, 132 F. Supp. 208 (Ct. Cl. 1955)	14

City & County of Denver v. Bergland, 517 F. Supp. 155 (D.C. Col. 1981) 16

Collyard v. Washington Capitals, 477 F. Supp. 1247 (D. Minn. 1979) 16

Coyle v. Smith, 221 U.S. 559 (1911) 17

Doe v. United States Civil Serv. Comm'n., 483 F. Supp. 539 (D.C. S.D.N.Y. 1980) 19

Doria Mining & Eng'g Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979), cert. denied sub nom. California v. Doria Mining & Eng'g Corp., 445 U.S. 962 (1980) . 9

Escanaba Co. v. Chicago, 107 U.S. 678 (1883) 17

Federal Energy Regulatory Commission v. Mississippi, 50 U.S.L.W. 4553 (U.S. June 1, 1982) (No. 80-1749) 18

Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119 (4th Cir. 1977) 9

Hill v. United States, 571 F.2d 1098 (9th Cir. 1978)..... 16

Hodel v. Virginia Surface Min. & Reclamation Association, 452 U.S. 264 (1981) 18

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) 8,14,21

Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979)..... 15

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 20

Lombard Corp. v. Resor, 321 F. Supp. 687 (D.D.C., 1970) 20

Martin v. Waddel, 41 U.S. (16 Pet.) 367 (1842) 8,10

Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973) 16

Montana v. United States, 450 U.S. 544 (1981) 11,12

National League of Cities v. Usery, 426 U.S. 833 (1976) .8,17,18

Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 12,14,17,21

People of State of Illinois, ex rel. Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977) 16

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) ...8,10, 12,17

Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132, rehearing denied, 627 F.2d 239 (5th Cir. 1980), cert. granted, ____ U.S. ____, 102 U.S. Ct. 88 (1981) 15

Shively v. Bowlby, 152 U.S. 1 (1894) 8,10,11,17

Skiriotes v. Florida, 313 U.S. 69 (1941)..... 17

Stearns v. Minnesota, 179 U.S. 223 (1900) 17

United Plainsmen Ass'n. v. North Dakota Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976) 8,13,21

United States v. Denby, 522 F.2d 1358 (5th Cir. 1975) .. 14

United States v. Lee, 106 U.S. 196 (1882) 18,20

United States v. Oregon, 295 U.S. 1 (1935)..... 9,14

United States v. Texas, 339 U.S. 707 (1950) 8,10,17

University of Maryland v. Cleland, 516 F. Supp. 448 (D. Md. 1981) 16

Utah v. United States, 403 U.S. 9 (1971)..... 17

Utah v. United States, No. C-79-0302J (Filed May 22, 1979; hearing June 10, 1979) 16

Watson v. Blumenthal, 586 F.2d 925 (2d Cir. 1978) 15

Weber v. Harbor Comm., 85 U.S. 57 (1873) 13,17

Zager v. United States, 256 F. Supp. 396 (E.D. Wis. 1966) 19

Constitution and Statutes:

United States Constitution Tenth Amendment 8,17

North Dakota Constitution Article IX, Section 9 14

5 U.S.C. 702, Judicial Review Under the Administrative Procedures Act 2,10,15,16

28 U.S.C. 1254(1), Jurisdiction of United States Supreme Court 2

28 U.S.C. 1331, Federal Question 3,5,9,15

28 U.S.C. 1346(f), Jurisdiction Under Quiet Title Act .. 5,6

28 U.S.C. 1361, Mandamus 3,10,14,16

28 U.S.C. 2201, Declaratory Judgment 3,5,10

28 U.S.C. 2409a, Quiet Title Act 5,6,7,8,14,16

43 U.S.C. 1301, Submerged Lands 4,8,11

43 U.S.C. 1311, Submerged Lands 4

43 U.S.C. 1311(d), Submerged Lands 15

Ch. 180, §7, 25 Stat. 676 (1889), Enabling Act (N.Dak) . 8,11

Public L. No. 96-486 9

Miscellaneous:

C. Wright, **Handbook of the Law of Federal Courts**, §22 (3d. ed. 1976) 9

14 Wright & Miller, **Federal Practice and Procedure**, §3655 (1976) 9,19

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,

CROSS PETITIONERS,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of the State of North Dakota on behalf of the Board of University and School Lands conditionally cross-petitions for a writ of certiorari to review a portion of the decision of the United States Court of Appeals for the Eighth Circuit in this case. The State requests that this cross-petition be granted only if the federal defendants' petition for a writ of certiorari is granted.

---

* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint. See Rule 40.3 of the Rules of this Court.

OPINIONS BELOW

The opinion of the court of appeals is reported at 671 F.2d 271. The opinion of the district court, entered on February 4, 1981, is reported at 506 F. Supp. 619. The memorandum and order of the district court, entered on February 21, 1980, is not reported. The memorandum and order, and the above opinions are reproduced in petitioners' petition for a writ of certiorari in petitioners' appendices A, C, and B respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1982, and a petition for rehearing was denied on March 15, 1982. See petitioners' appendices E and F respectively. On June 4, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1982. Receipt of the petitioner (No. 81-2337) was acknowledged by the Attorney General of the State of North Dakota June 28, 1982. This cross-petition is submitted pursuant to Rule 19.5 of the United States Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 5 U.S.C. 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The

United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate level or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 28 U.S.C. 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. 1361 provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

4. 28 U.S.C. 2201 provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5. 43 U.S.C. 1301 provides in pertinent part:

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

* * * * * * * *

6. 43 U.S.C. 1311 provides in pertinent part:

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United State, if any it has, in and to all said lands, improvements, and natural resources;***.

* * * * * * * *

STATEMENT

1. This action was commenced in federal district court October 31, 1978. The complaint filed by the State of North Dakota requested (1) a declaratory judgment that the Little Missouri River was a navigable river and (2) equitable relief enjoining the Secretaries of Interior and Agriculture and their subordinates from exercising the privileges of ownership to the bed of the river on behalf of the United States. The State or North Dakota claimed ownership of the bed based on a belief that the river is navigable. The United States owns certain lands[1] that are riparian to the Little Missouri River and apparently asserted ownership of the riverbed under the mistaken belief that the river was not navigable.

On July 10, 1979, the State filed a motion for summary judgment. The federal defendants filed a cross-motion for summary judgment on October 11, 1979. On February 18, 1980, the district court denied both motions, but did require the State to amend its complaint so as to assert federal jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute). The State had asserted federal jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*).[2]

---

[1] Nearly all of the federal riparian lands are acquired lands, not public domain. The surface estate is managed by the United States Forest Service and the mineral estate is managed by the Bureau of Land Management. These lands were acquired pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010-1012, originally enacted in 1937. There are also substantial amounts of state-owned and privately-owned riparian lands along the Little Missouri River.

[2] In requiring the State to amend its complaint, the district court simply concluded that "the complaint does not support the claim of a Federal question." Petitioners' App. B, p. 15a.

The State did amend its complaint as directed, asserting jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute), however, the State still believes that its original assertion of jurisdiction was also proper and correct.

A one-day trial was held. At the trial the State offered evidence that the Little Missouri River was navigable. The federal defendants submitted no evidence on the issue of navigability. Instead, the federal defendants argued that the twelve year statute of limitations (28 U.S.C. 2409a(f)) barred the State from bringing the quiet title action. Over the objections of the State, the federal defendants offered the testimony of a records management employee of the Bureau of Land Management (BLM) concerning the records kept at the District Office of the BLM in Billings, Montana. In addition, the federal defendants offered certain letters that allegedly showed that the State "knew or should have known of the claim of the United States" to the Little Missouri River more than twelve years prior to the filing of its compiaint. The State disputed the veracity and relevancy of the evidence and disputed the rationale of the federal defendants' argument.

In its ruling, the district court did not address the federal defendants' evidence because the court ruled that the statute of limitations (28 U.S.C. 2409a(f)) contained in the quiet title statute did not apply to the State where it sought to quiet title to its sovereign public trust lands (the beds of navigable lakes and streams). Moreover, the district court declared that the Little Missouri River was a navigable river at statehood,[3] that title to the bed vested in the State of North Dakota at statehood[4] and that the State cannot be defeated in its assertion of title to the bed.[5] The court's judgment decreed that title to the riverbed "is

---

[3] Petitioners' App. C, p. 21a and Petitioners' App. D, p. 29a.

[4] Petitioners' App. C, p. 21a.

[5] *Id.* at 25a.

hereby quieted in the State of North Dakota" with the exception of certain portions of the bed that may constitute part of the Fort Berthold Indian Reservation.[6] Finally, the judgment ordered the United States "to cease and desist from exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of North Dakota."[7]

2. The federal defendants appealed and the State filed a cross-appeal. The State's cross-appeal asserted that its original grounds for jurisdiction were proper and correct. The court of appeals, in affirming the district court's judgment, ruled that Congress waived sovereign immunity for quiet title actions in 28 U.S.C. 2409a.[8] The court of appeals affirmed the district court's finding that the Little Missouri River was navigable at the time of North Dakota's statehood.[9] The Court of appeals affirmed the district court's ruling that the statute of limitations in the federal quiet title statute (28 U.S.C. 2409a(f)) does not apply to states where the title dispute concerns sovereign public trust land.[10] Due to its disposition of the case the court of appeals did not consider the State's cross-appeal.[11]

Throughout this litigation the federal defendants have attempted to avoid any hearing on the merits by contending there is no jurisdiction for federal courts to hear this matter. The State, however, has consistently sought a decision based on the merits.

---

[6] Petitioners' App. D, p. 29a-30a. The portions of the bed that could potentially constitute Indian lands were excluded in the State's complaint that originated the action.

[7] *Id.* at 30a.

[8] Petitioners' App. A, p. 4a.

[9] *Id.* at 13a.

[10] *Id.* at 9a.

[11] *Id.*

REASONS FOR GRANTING THE CROSS-PETITION

This litigation involves the bed of the navigable Little Missouri River. The nature of this land is central to the State's claim that federal courts have jurisdiction apart from 28 U.S.C. 2409a (quiet title statute). By virtue of common law,[12] the equal footing doctrine,[13] the public trust doctrine,[14] the Submerged Lands Act,[15] and the Enabling Act for the State of North Dakota,[16] these lands constitute the sovereign lands of the State of North Dakota. Moreover, the tenth amendment protects basic attributes of state sovereignty such as a state's title to sovereign public trust lands;[17] this is especially true where federal officials act beyond their authority.

The State brought this action to determine the navigability of the Little Missouri River and to enjoin federal officials from interfering with the State's sovereign ownership of the bed of the Little Missouri River. The State contended that the Little Missouri River was navigable in fact and in law; the State had actively managed the bed since the 1950s. The district court and court of appeals sustained the State's argument of navigability for purposes of establishing the ownership of the bed. Even the federal defendants have now conceded navigability, as they have not sought review of this matter in their petition for certiorari.

---

[12] *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

[13] *United States v. Texas*, 339 U.S. 707, 716 (1950); *Shively v. Bowlby*, 152 U.S. 1, 26-31 (1894); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1844).

[14] *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *United Plainsmen Ass'n v. North Dakota Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976).

[15] 43 U.S.C. 1301, *et seq.*

[16] Ch. 180, §7, 25 Stat. 676, 678 (1889).

[17] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Since the navigability of the Little Missouri River has now been established and is no longer challenged by the federal defendants, the only relief the State seeks is to prevent federal officials from interfering with the State's sovereign ownership of the bed of the Little Missouri River.

1. In its original action the State's theory of jurisdiction was two-fold. First, when the State sought to determine whether the Little Missouri River was navigable for purposes of establishing the ownership of the bed, it brought to the federal courts for litigation an issue that is clearly a federal question.[18] Thus, this issue could be determined by a federal court under 28 U.S.C. 1331.[19] Also, an action to determine navigability seeks a

---

[18] *United States v. Oregon*, 295 U.S. 1, 14 (1935).

[19] Arguably, the 1980 amendment to 28 U.S.C. 1331 in and of itself constitutes the necessary waiver of sovereign immunity as this is clearly a case "arising under the Constitution." *See* Public L. No. 96-486. This amendment applied to all cases pending at the time the amendment was enacted. *Id.* This case was pending at that time. Professor Wright has stated:

> When property rights of the government are challenged, the Court, despite strong scholarly criticism, is now firmly committed to the doctrine that suits, though in form against the officer, are in reality against the United States and thus barred by sovereign immunity, *except in the unlikely circumstance that the officer named as defendant is exceeding his statutory powers in holding the property or that his statutory powers are constitutionally void.*

C. Wright, *Handbook of the Law of Federal Courts*, § 22 at 84, (3d ed. 1976); 14 *Wright & Miller, Federal Practice and Procedure*, § 3655 at 180-184 (1976). The State submits that this case constitutes the "unlikely circumstances"—a federal officer exercising privileges of ownership over a navigable river bed without statutory authority and in defiance of the equal footing doctrine of the Constitution. *See generally Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 608 n. 6 (1978); *Doria Mining & Eng'g Corp. v. Morton*, 608 F.2d 1255, 1257 (9th Cir. 1979), *cert. denied sub nom. California v. Doria Mining & Eng'g Corp.*, 445 U.S. 962 (1980); and *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119, 1123, n. 4 (4th Cir. 1977).

declaratory judgment rather than a judgment of damages. Thus, the State asserted jurisdiction pursuant to 28 U.S.C. 2201 (declaratory judgment act).

Second, the State sought protection against an unwarranted, unlawful, and unconstitutional infringement of its sovereignty—the federal defendants' interference with the State's ownership of the bed of the river. Such protection and the jurisdiction to preserve this fundamental aspect of our federal system must be recognized to be available under 28 U.S.C. 1361 (mandamus) and 5 U.S.C. 702 (the judicial review provisions of the Administrative Procedures Act).

The logic of the State's two-fold approach is backed by established principles of law governing the beds of navigable waters.

a. State ownership of beds of tidal navigable waters was established as a matter of federal law in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).[20] Although *Martin* specifically applied only to the original thirteen states, three years later the rule was extended to all states in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844) under the "equal footing doctrine."[21] State sovereignty over nontidal navigable waters was recognized in *Barney v. Keokuk*, 94 U.S. 324 (1876). The fact that states own the beds of navigable inland waters was confirmed by Congress

---

[20] The Court in *Martin* held that tidal and submerged lands beneath navigable waters passed from the British Crown and vested in the original thirteen states after the American Revolutionary War. These states did not surrender these lands to the federal government under the Constitution; these lands were reserved subject only to paramount right of the federal government to protect navigation.

[21] This doctrine provides that states admitted to the Union have the same sovereignty, jurisdiction, and absolute title over sovereign lands as do the original states because they were admitted on an "equal footing" with the original states. *See also, United States v. Texas*, 339 U.S. at 716 (1950) and *Shively v. Bowlby*, 152 U.S. at 26-31 (1894).

with the passage of the Submerged Lands Act, 43 U.S.C. 1301-1341.[22] The Enabling Act for North Dakota provides that North Dakota shall be deemed admitted by congress into the union on an equal footing with the original states. See Enabling Act, Ch. 180, §7, 25 Stat. 676 (1889).

That the United States has no authority to claim the beds of a navigable stream against a state is also supported in *Shively v. Bowlby,* 152 U.S. 1 (1894), and the recent case of *Montana v. United States,* 450 U.S. 544 (1981). In *Shively* this Court recognized while "Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States," it may do so only "whenever it becomes necessary . . . in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively,* at 48. The Court continued:

> And the Territories acquired by Congress . . . are held with the object . . . of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the [beds of navigable waters] are held by the United States . . . '*in trust for the future States.*' *Pollard v. Hagan,* 3 How. 212, 221, 222; *Weber v. Harbor Commissioners,* 18 Wall. 57, 65; *Knight v. United States Land Association,* 142 U.S. 161, 183.

---

[22] The fact that the Submerged Lands Act *confirmed* previously vested state title to the beds of inland navigable waters is apparent from the language of *California ex rel. State Lands Commission v. United States,* 50 U.S.L.W. 4671, 4672 (U.S. June 18, 1982) No. 89-Original.

> The Congress of the United States, in disposing of public lands, has constantly acted upon teh theory . . . that *the navigable waters and the soils under them* . . . shall be and remain public highways; . . . shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, *shall be held by the United States in trust for the future States* . . . ."

Id. at 49-50 (emphasis supplied).

The more recent case of *Montana v. United States,* 450 U.S. 544 (1981), even more clearly states the proper role of the United States as a trustee for future states insofar as the beds of navigable waters are concerned. *Montana* also dealt with the role of the United States as a trustee for Indian Tribes. In denying that the Crow Tribe held title to the bed of the Big Horn River, this Court stated:

> [T]he ownership of land under navigable waters is an incident of sovereignty. [citation omitted] As a general principle, the Federal Government holds such lands in trust for future States . . . . A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States.

Id. at 551-552.

In other words, except in specifically defined circumstances, the United States, as "trustee", for future states may not grant the trust corpus (beds of navigable waters) away. Surely, the United States, as "trustee," may not divert such corpus to its own use. To do so would be a fraudulent violation of its ficuciary obligation.

In another recent case, this Court reaffirmed state title to "sovereign" lands. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). In discussing the earlier case of *Pollard's Lessee v. Hagan,* this Court said:

> [U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred *not by Congress but by the Constitution itself.* The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the *title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.* For example, in *Weber v. Harbor Comm'rs* [citations omitted], the Court reaffirmed the doctrine of *Pollard's Lessee:*
>
> > 'Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over,* all soils under the tide-waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters . . . .'' (Emphasis supplied.)

Id. at 374, quoting *Weber v. Harbor Comm'*, 85 U.S. 57, 65-66 (1873) In addition, this Court stated:

> [T]he State's title to the riverbed vests absolutely as of the time of its admission and *is not subject to later defeasance by operation of any doctrine of federal common law.*

Id. at 370-71.

> Thus, if the lands at issue did pass under the equal footing doctrine, state title is not subject to defeasance and *state law governs subsequent dispositions.* (emphasis supplied).

Id. at 378.

Concerning the matter of subsequent disposition, North Dakota recognizes the public trust doctrine that states hold title to the beds of navigable lakes and streams in trust for the public. *United Plainsmen Association v. North Dakota State*

Water Conservation Commission, 247 N.W.2d 457, 461 (N.D. 1976). This Court has stated that the public trust doctrine limits a state's right to divest itself of title to the beds of navigable waters. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892). In any event, no record exists of a conveyance of the bed of the Little Missouri River by the State to the federal government. Furthermore, applying the rule of *Corvallis* that state law governs the disposition of sovereign lands, it follows that the federal government cannot claim the bed by adverse possession, as Article IX, Section 9 of the North Dakota Constitution provides:

> No claim for the occupation, cultivation, or improvement of any public lands shall ever be recognized, . . .[23]

Finally, as previously stated, the issue of navigability is a federal question. *United States v. Oregon*, 295 U.S. 1, 14 (1935). This means that jurisdiction is established under 28 U.S.C. 1331.

Given these legal principles the State's *indefeasible* title to the bed of the Little Missouri River is automatically *confirmed* by a declaratory judgment of navigability. In fact, absolute title (subject only to paramount federal rights to protect the right of navigation) to the bed vested in the State at statehood in 1889. In other words, title need not be quieted under 28 U.S.C. 2409a because, given the holding in *Corvallis*, title cannot be in dispute. In other words, the United States cannot lawfully hold

---

[23] One federal case suggests that state laws barring adverse possession against a state are not applicable where the United States asserts adverse possession. *The People of the State of California v. United States*, 132 F. Supp. 208 (Ct. Cl. 1955). *California*, however, did not deal with sovereign public trust lands. Moreover, *California* was a suit for damages, not recovery of possession. Thus, in light of *Corvallis*, the nature of the lands in the present case demands a different conclusion. *See also, United States v. Denby*, 522 F.2d 1358 (5th Cir. 1975).

title to the bed of the navigable Little Missouri River against the State of North Dakota.[24]

b. Even though a declaratory judgment of navigability lays to rest any title dispute, the federal defendants must still be enjoined from interfering with the State's sovereignty over the riverbed. Jurisdiction to grant such relief and the waiver of sovereign immunity, which permits the State to bring the federal defendants into court so that the relief may be ensued, is established by 5 U.S.C. 702 (the judicial review provisions of the Administrative Procedure Act) and 28 U.S.C. 1361 (mandamus). Also, as previously mentioned, there is some authority that 28 U.S.C. 1331 also constitutes the waiver of sovereign immunity in cases such as this.[25] In any event, federal courts have held that 5 U.S.C. 702 does provide a waiver of sovereign immunity under 28 U.S.C. 1331.

In *Jaffee v. United States,* 592 F.2d 712 (3d Cir. 1979), *cert. denied,* 441 U.S. 961 (1979) the Court of Appeals for the Third Circuit held that Section 702 of the Administrative Procedures Act "waives sovereign immunity in 'nonstatutory' review of agency action under section 1331 [federal question statute]. . . . It was therefore precisely for equitable actions under section 1331 that Congress enacted the amendments to section 702." *Id.* at 718-19 citing the U.S. Code Congressional & Administrative News and criticizing *Watson v. Blumenthal,* 586 F.2d 925, 932 (2d Cir. 1978). See also, *Sheehan v. Army and Air Force Exchange Service,* 619 F.2d 1132, *reh'g. denied,* 627 F.2d 239 (5th Cir. 1980), *cert. granted,* ____ U.S. ____, 102 S.Ct. 88

---

[24] The only exception to this is found in the Submerged Lands Act which specifically allows the United States to condemn the beds of navigable waters. 43 U.S.C. 1311(d). The United States, however, has never brought condemnation proceedings against the State title to the bed of the Little Missouri River.

[25] See note 19, *supra.*

(1981); *Hill v. United States,* 571 F.2d 1098 (9th Cir. 1978); *City & County of Denver v. Bergland,* 517 F. Supp. 155 (D.C. Col. 1981); *University of Maryland v. Cleland,* 516 F. Supp. 448 (D.Md. 1981); *Collyard v. Washington Capitals,* 477 F. Supp. 1247 (D. Minn. 1979); and *People of State of Illinois, ex rel. Scott v. Hoffman,* 425 F. Supp. 71 (S.D. Ill. 1977) (navigable waters).[26]

Also, 28 U.S.C. 1361 (mandamus) grants jurisdiction:

> It has long been recognized that mandamus is the appropriate remedy where federal officials are acting outside the zone of their permissible discretion and contrary to law.

Miller v. Ackerman, 488 F.2d 920, 921 (8th Cir. 1973).

The federal defendants have previously argued that sovereign immunity prohibits the federal courts from hearing this issue except as a quiet title action. In making this argument the federal defendants have not cited a single case where a state was seeking a declaration of navigability and an injunction against federal interference with state dominion over sovereign public trust lands. Again, the nature of these lands is central to the case.[27]

---

[26] The federal defendants have argued that relief is not available under 5 U.S.C. 702 because of the language forbidding relief "if any other statute that grants consent to sue expressly or implicitly forbids the relief which is sought." The federal defendants cite the statute of limitations found in 28 U.S.C. 2409a(f) (quiet title act) as such a statute. This argument is erroneous because the original action was not an action to quiet title, but was an action for a declaratory judgment of navigability; the issue of navigability is a federal question. See, discussion, *supra.*

[27] For a pending case brought on a theory similar to North Dakota's see, *Utah v. United States,* No. C-79-0302J (filed May 22, 1979; hearing June 10, 1979).

2. Notwithstanding the previous arguments, the State submits that federal courts have jurisdiction to hear this type of case apart from any special statutory waiver of sovereign immunity. The relationship between the federal government and individual states is a bilateral contract under which each state acquires certain basic sovereign rights, placing each state on a par with all other states in the Union. These rights cannot be diminished or infringed upon. Under this original bargain the State should have the right to protect its claim to sovereign public trust lands because the State's source of title is the Constitution. No subsequent act of Congress or act of a federal officer can impair a state's title to sovereign trust lands, or a state's right to protect that title.

a. Because of the sovereign and public trust nature of the lands involved, jurisdiction is provided by virtue of the equal footing doctrine and the tenth amendment. In other words, this action could have been heard by a federal court prior to the enactment of any of the previously mentioned federal statutes. This is clearly implicit in the following opinions: *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 368 (1977) (navigable waters-equal footing); *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976 (tenth amendment); *Utah v. United States*, 403 U.S. 9 (1971) (navigable waters); *United States v. Texas*, 339 U.S. 707, 716 (1949) (equal footing); *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (equal footing); *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (equal footing); *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) (equal footing); *Shively v. Bowlby*, 152 U.S. 1, 26, 49 (1894) (navigable waters-equal footing); *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883) (equal footing); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) (navigable waters-equal footing); *Weber v. Harbor Commissioners*, 85 U.S. 57, 65-66 (1873) (navigable waters-equal footing); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-229 (1845); and many others. The federal defendants' actions totally ignore the public trust nature of the lands involved and so clearly interfere with the

State's sovereignty over such lands that jurisdiction to review such unwarranted and unconstitutional conduct arises in the Constitution. Indeed, the equal footing doctrine and the tenth amendment prohibit any act of Congress that would impair such jurisdiction. As this Court said in *National League of Cities*:

> We have repeatedly recognized there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter.

National League of Cities v. Usery, 426 U.S. 833, 845 (1976). See also, *Federal Energy Regulatory Commission v. Mississippi*, 50 U.S.L.W. 4553 (U.S. June 1, 1982) No. 80-1749 and *Hodel v. Virginia Surface Min. & Reclamation Association*, 452 U.S. 264 (1981).[28]

b. Moreover, the State still has a viable case against the federal defendants based on their scope of authority. The question of the federal defendants scope of authority and, as a con-

---

[28] Justice Miller eloquently summarized the necessity for federal courts to exercise jurisdiction in cases where property rights are wrongfully invaded by federal officials:

> Shall it be said * * * that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession?
>
> If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

United States v. Lee, 106 U.S. 196, 220-221 (1882).

sequence, their ability to claim sovereign immunity, were intertwined with the merits of this case at its outset. However, this is no longer true because the federal defendants have now conceded the navigability issue. In other words, since the State was correct on the navigability issue, the federal defendants were clearly acting beyond their authority in issuing oil and gas leases to the bed of the Little Missouri River. In fact, this action unlawfully interfered with the State's entitlements under the equal footing doctrine of the Constitution.

Given the navigability ruling, all this Court need do is sustain the equitable relief requested by the State in its original and amended complaints. Sovereign immunity cannot bar this relief.

A basic exception to the doctrine of sovereign immunity arises when a federal officer acts outside the scope of his authority. 14 Wright & Miller, *Federal Practice and Procedure,* §3655, at 186-213 (1976); *Doe v. United States Civil Service Commission,* 483 F.Supp. 539 (S.D.N.Y., 1980). In *Andros v. Rupp,* 433 F.2d 70 (9th Cir. 1970), the Ninth Circuit Court allowed an action against a forest supervisor of the United States to restrain him from interfering with the use and possession of the plaintiff's land. Plaintiff's land was located within a forest preserve, but was excepted from the proclamation establishing the preserve. The court rejected defendant's argument that the action constituted a quiet title action against the United States without its consent, since defendant had no statutory authority to control plaintiff's property.

In another action, the Secretary of Interior could not claim sovereign immunity when his actions were beyond his authority. *Zager v. United States,* 256 F.Supp. 396 (E.D. Wis. 1966). The Secretary of Interior had ordered a resurvey of certain property that the plaintiff claimed. Following the survey, the Secretary took possession of the property without lawful authority. See also, *Armstrong v. Udall,* 435 F.2d 38 (9th Cir. 1970).

These decisions are consistent with the pronouncement of the United States Supreme Court on the subject in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), wherein the Corut in discussing this matter stated that sovereign immunity does not bar judicial review of an officer's acts if they "conflict with the terms of his valid statutory authority." *Id.* at 695. The fact that such an action seeks declaratory or injunctive relief will not prevent it from being maintained under this exception to the doctrine of sovereign immunity. See, for example, *United States v. Lee*, 106 U.S. 196 (1882); *American Federation of Government Employees, Local 1858 v. Callaway*, 398 F.Supp. 176 (N.D. Ala. 1975); and *Lombard Corp. v. Resor*, 321 F.Supp. 687 (D.D.C., 1970).

CONCLUSION

The federal defendants are not entitled to hide behind the doctrine of sovereign immunity in this case because (1) a sovereign state is suing to protect its sovereign interests; and (2) the action concerns public trust lands. The bed of the Little Missouri River vested in the State of North Dakota upon North Dakota's admission to the Union by virtue of the equal footing doctrine; title to these lands is a basic attribute of sovereignty and derives not from any federal grant but from rights reserved to the states under the Constitution.[29]

Moreover, these lands are held in trust for the public under the public trust doctrine. This Court and the North Dakota Supreme Court have recognized the trust character of these lands as being fundamentally different from lands held in a mere proprietary capacity.[30]

Finally, the State submits that the equal footing doctrine, the public trust doctrine, and the Submerged Lands Act must have some tangible meaning and effect. If federal officials may simply administratively ignore these constitutional doctrines and law, interfere with state sovereignty over the beds of navigable waters, and bar the state from seeking a remedy in federal court, then the foregoing have no tangible meaning. The studied and purposeful Submerged Lands Act (with its extensive and detailed legislative history), and the numerous decisions of this Court enumerating the public trust and equal footing doctrines, will be nullified should this Court deny a state's right to protect its claim to sovereign public trust lands.

---

[29] This was recently reaffirmed in *Oregon v. Corvallis Sand and Gravel Co., supra,* at 374.

[30] *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892); and *United Plainsmen Ass'n v. North Dakota Water Conservation Commission,* 247 N.W.2d 457 (N.D. 1976).

The State requests that, should the Federal defendants' petition be granted, this court grant this cross-petition for a writ of certiorari in order that the State of North Dakota may assert its right to protect its federally recognized sovereignty over public trust lands in the federal courts.

Respectfully submitted.

Robert O. Wefald
Attorney General
State of North Dakota

Owen L. Anderson
Special Assistant
Attorney General
State of North Dakota

July, 1982